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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71 - 370

NICK SCAGLIONE,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

NICK SCAGLIONE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Undersigned counsel, on behalf of Petitioner, NICK SCAGLIONE, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case entered on July 9, 1971, rehearing denied, August 19, 1971.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and a copy of the opinion below is attached hereto as Exhibit "A". A copy of the letter from the Court of Appeals indicating no opinion on denial of the Petition for Rehearing is attached as Exhibit "B".

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1). The judgment of the Court of Appeals was entered on July 9, 1971, and rehearing denied on August 19, 1971.

QUESTIONS PRESENTED

I. WHETHER, IN VIEW OF *MARCHETTI v. UNITED STATES* 390 US 62 (1968), AND *GROSSO v. UNITED STATES* 390 US 62 (1968), EVIDENCE OBTAINED AS A RESULT OF A PRE-*MARCHETTI-GROSSO* SEARCH BY WARRANT SHOULD HAVE BEEN EXCLUDED IN A CRIMINAL PROSECUTION OF PETITIONER UNDER 18 USC 1953.

II. WHETHER THE GUILTY VERDICT BELOW SHOULD HAVE BEEN INVALIDATED DUE TO A PRIVATE COMMUNICATION, POSSIBLY PREJUDICIAL, BETWEEN THE DEPUTY U. S. MARSHAL AND THE JURY, IN VIEW OF *MATTOX V. US* 149 US 140 (1892).

III. WHETHER A REVERSAL SHOULD HAVE RESULTED CONSEQUENT TO ALLOWANCE BY THE TRIAL COURT OF PREJUDICIAL AND IMPROPER FINAL ARGUMENT BY THE PROSECUTOR, IN VIEW OF *BERGER V. US*, 295 US 78 (1935).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On February 20, 1968, a five-count indictment was filed in the United States District Court, Middle District of Florida, charging Petitioner Nick Scaglione with knowingly and intentionally and unlawfully causing gambing paraphernalia to be sent in Interstate Commerce from New York to Tampa, Florida, said paraphernalia consisting of 1000 sheets of flash paper. The relevant dates of offense for each of the counts were, respectively, October 2, 1963; September 11, 1964; July 20, 1964; March 2, 1965; and June 7, 1965. Each count charged a violation of Section 1953, Title 18, US Code. The Petitioner on October 20, 1969, suffered a verdict of guilty as to each count. On November 21, 1969, Petitioner was sentenced to four years upon each count for concurrent service and notice of appeal was filed on the same day.

During the trial the District Court allowed into evidence material seized or secured on or about April 24, 1965 and predicated upon execution of a Search War-

rant issued pursuant to violations involving the Gambling-Wagering Tax Registration Act (Sections 4411, 4412, 4901 and 7203 of the Internal Revenue Code 1954). The evidence admitted was voluminous.

With respect to the second point above, the jury, while deliberating, had a communication with a Deputy United States Marshal, described by the Deputy in this way:

> They asked if their decision had to be unanimous, and I instructed them to go by your instructions and that they would have to agree. And then I asked - they tried to ask me about something, and I said, "If you have any questions, write a note and I will take it to the Court".

With respect to point number three above, Petitioner Scaglione in his brief in the Fifth Circuit Court of Appeals quoted from the trial court record improper remarks by the prosecutor which included the following:

> ". . . . in fact, right under the noses of the local State and Federal Governments, a man such as Nick Scaglione is allowed to perpetrate his evils upon society in his community."
>
> "It may be a small and insignificant matter to Mr. Gonzalez but it means a great deal to us, as citizens of the United States; and that is why we wanted you to know about it. . . . (Tr. 1030)."
>
> "We are not trying a man for ordering flash paper or causing it to be ordered down here just because he ordered flash paper. This is not why we are here." "We are here to dry up a vicious, a ruinous business; a business that saps on society. . .:" (Tr. 1032)

"If we knew - if we knew - that's right - if we knew we would have it; but we don't know because they act in secrecy. They act in stealth. They don't tell you. They know they can't tell you."

"But they make loads and loads of money. And what happens?"

"Pick up your paper and find out what happens."
"Who is the victim?"

"I say that all of us are the victims of this type of operation."

"In 1967 the President's Commission on Crime stated that every American is, in a sense, a victim of crime." (Tr. 1036-1037).

"Pick up your newspaper as I am sure you have."

"Look over in New Orleans right now."

"They are investigating the corruption of police officials." (Tr. 1038)

"You have an opportunity now to rip away a member of a vicious organization; an organization that lives on this type of business."

"Rip him away. Upset - make the rats run from the sinking ship. Because when you rip away one cog from the wheel it will collapse." (Tr. 1043-1044).

"That man is the man who made his livlihood by getting money, such as you never dreamed of, from the wages of innocent people; and who lives by breaking the law." (Tr. 1045).

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Eighth Circuit has passed on the question involved in this case in *Hanon v U.S.*, 428 F.2d 101 (8th Cir. 1970) (en banc), cert. denied, 39 USLW 3480 (1971). Prior to en banc reversal of the initial holding in the *Hanon* Case, the three judge panel had decided, and properly so insofar as Petitioner Scaglione contends, as follows:

> "The exercise of the Fifth Amendment privilege against self-incrimination under Marchetti and Grosso relates to the right of an individual not to be punished for failure to make known his gambling activities through registration or taxation. The privilege is exercised upon the individual's noncompliance with the federal statutes requiring him to incriminate himself. The Court in Marchetti makes it clear "that those who properly assert the constitutional privilege as to these provisions may not be punished for failure to comply with their requirements." 390 U.S. at 61.
>
> "Where an individual fails to register or pay the tax to avoid self-incrimination, this very conduct should not provide the direct avenues to obtain evidence to prosecute on other charges. Whether the government prosecutes directly for failing to pay the tax, or because of such failure seizes evidence to prosecute under other criminal laws makes little difference."

This Court has not specifically held the decision in *Marchetti-Grosso* non-retroactive to a set of facts such as presented here. This case is not like *Mackey v United States,* 28 L.Ed 2d 404 (1971), wherein *Grosso* and *Marchetti* were not held retroactive to use of wagering excise tax returns in a criminal prosecution for income

tax evasion. Petitioner Scaglione contends that there is a great deal of difference between the use of excise tax returns actually filed by *Mackey* and the seizure of evidence pursuant to a Search Warrant executed at a place which the record below will show did not even belong to Petitioner Scaglione. A boiled-down statement of the situation here is that, although Petitioner Scaglione had a previous conviction involving this same particular search reversed on the authority of *Marchetti v US* (*Scaglione vs US,* 396 F.2d 219, Fifth Cir. 1968), the Government in 1969 convicted Scaglione of violation of a separate statute and used the same evidence which was seized in the case reversed because of *Marchetti* to establish an essential element of the offense charged under 18 USC 1953.

With respect to points two and three of the questions involved above, Petitioner simply states that it is felt that the Court of Appeals was wrong in not reversing on either of the points and that the District Court did not follow established law of this Court. The latter two points Petitioner admits are not those which this Court ordinarily would consider upon Certiorari and Petitioner relies upon point one concerning the *Grosso-Marchetti* issue as a problem of great moment which the Court should review and which the Court is well prepared to review in light of very recent determination of closely related problems in *U.S. v U.S. Coin and Currency* 28 L.Ed 2d 434 (1971) and *Mackey v U.S.,* supra. And, Petitioner submits that, within the meaning and request of Supreme Court Rule 19 (Considerations Governing Review on Certiorari), the Fifth Circuit Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court, to-wit, *Marchetti v U.S.,* supra; *Grosso v U.S.,* supra; *U.S. v. U.S. Coin and Currency,* supra.

CONCLUSION

The Petition for Writ of Certiorari should be granted and this Court should thereafter reverse the judgment of the Court of Appeals.

HENRY GONZALEZ
ROBERT H. MACKENZIE
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Tampa, Florida 33602

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the foregoing has been furnished by mail to the United States Attorney, Tampa, Florida, this 1st day of September, 1971.

Attorney

EXHIBIT "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29279

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NICK SCAGLIONE,

Defendant-Appellant

Appeal from the United States District Court for the Middle District of Florida

---

(July 9, 1971)

Before BROWN, Chief Judge, TUTTLE and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: Scaglione appeals from his conviction by a jury on all five counts of an indictment charging that, on each of five dates, he knowingly and intentionally caused to be sent in interstate commerce gambling paraphernalia consisting of flash paper intended to be used as a device in a numbers, policy, bolita, and other similar games, in violation of 18 U.S.C. § 1953. Flash paper, having been chemically treated so as to be instantly combustible when heat is applied, is used in policy and similar games because it can be quickly destroyed if there is a threat of seizure. We affirm.

1.

The trial court did not err in denying defense demands for production under the Jencks Act, 18 U.S.C. § 3500, of two interview reports of FBI agents who had interviewed government witness Candeleiri. Candeleiri was examined fully on voir dire. He testified that he signed no statement, that he did not observe the agents taking notes in their interviews with him, and that he saw no notes. The trial judge examined the agents' interview reports and ascertained that they were not signed by Candeleiri. All concerned recognized that the reports were not producible unless, under § 3500(e) (1), they had been "otherwise adopted or approved" by Candeleiri.

Two or three days before trial the prosecutor met with Candeleiri in the presence of the agents who had interviewed him. As the prosecutor described it, he asked Candeleiri to "give the facts of the case as you remember them," that Candeleiri did so, and at some points where Candeleiri's recital differed from what was shown by the report the prosecutor would interrogate him further about the particular aspect. The prosecutor stated also "we simply reviewed the substance" of the reports.

Candeleiri's description was that the prosecutor held the statement[s] in his hand and from time to time read to him and asked him "What about it?" and would ask "Do you recall the statement?" The trial court asked Candeleiri:

> Q. Do you know whether he was asking you what was in the statement or not?

to which Candeleiri responded:

> A. Well, he looked at it and asked me, so I imagine he did, Judge.

The government relies upon *Matthews v. U.S.*, 407 F.2d 1371 (5th Cir. 1969) which held that an agent's reading portions of his notes to the person interviewed and asking him to vertify the accuracy thereof, which the person did, was not an adoption of the agent's notes in their entirety. We pointed cut, 407 F.2d at 1376, that there was no verbatim or even substantially verbatim repetition of the notes by the agent to the witness or a confirmation by the witness of their completeness. However, *Matthews* is not a free ticket to circumvention of the Jencks Act. We do not exclude the possibility that the witness may adopt or ratify an interview report in a piecemeal manner by response to a number of inquiries as effectually as by a single generalized response. The inquiry is whether the witness has made as his own "the product of the investigator's selectiveness, interpretations and interpolations," *Palermo v. U.S.*, 360 U.S. 343 at 350, 3 L.Ed. 2d 1287 at 1294 (1959), so that the defense should be permitted to use it to impeach him. If the witness has not done so it is grossly unfair to use the language, interpretations and interpolations of someone else to impeach him. *Id.* Our review of the trial judge's ruling that Candeleiri did not adopt the interview reports is to determine whether it was plainly erroneous. *Matthews, supra,* 407 F.2d at 1376. We are not able to say that it was.

Alternatively, appellant urges that a witness' testimony from the stand which is consistent with a statement not signed and not otherwise adopted or ratified is itself a ratification or adoption. This is a fundamental contradiction. The Jencks Act is directed to making the witness' statement available so that contents which are inconsistent with his in-court testimony may be used for impeachment. If the testimony is so consistent with the statement as to be an adoption or ratification thereof it can serve no purpose as impeaching.

Appellant also claims to have been erroneously denied Jencks Act production of statements of witnesses Fried and Elz. There was no evidence of their ratifying or adopting their statements, and the defense did not even demand the statement of Elz.

2.

On April 24, 1965 Internal Revenue Service agents raided an apartment which did not belong to appellant, pursuant to a search warrant predicated on the federal wagering tax statutes. The affidavit for the warrant alleged violations of Sections 4411, 4412, 4901 and 7203 of the Internal Revenue Code of 1954.[1] Scaglione was found in a room of the apartment with a large quantity of assorted gambling paraphernalia. The paraphernalia was seized, Scaglione was arrested and other paraphernalia taken from his person. He was charged with failing to register and pay the special occupational tax required of persons in the business of accepting wagers, in violation of Sections 4411, 4412, 4901(a) and 7203. Scaglione filed a motion to suppress, it was denied, and he was tried and convicted. This court reversed, *Scaglione v. U.S.*, 396 F.2d 219 (5th Cir. 1968), on the authority of *Marchetti v. U.S.*, 390 U.S. 39, 19 L.Ed. 2d 889 (1968).

In the present case, some of the paraphernalia seized in the search of April 24, 1965 was introduced, over objection, as circumstantial evidence of Scaglione's guilt of the charge of interstate transportation of gambling paraphernalia. Thus we are squarely presented with the question whether *Marchetti* and its companion case, *Grosso v. U.S.*, 390 U.S. 62, 19 L.Ed. 2d 906 (1968), apply retroactively to bar the introduction, in a collateral prosecution under § 1952, of evidence seized during a pre-*Marchetti-Grosso* search pursuant to a warrant issued on the basis of probable cause to believe there existed a violation of the statutory scheme invalidated in *Marchetti* and *Grosso*. Because of our disposition of this question, it is unnecessary for us to pass on the government's contention that Scaglione may not now raise this issue because he failed to raise it in his earlier appeal.

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[1] 26 U.S.C. §§ 4411, 4412, 4901 and 7203.

The Supreme Court has not answered the precise question before us, but it is one of the issues presented in *Washington v. U.S.*, 402 F.2d 3 (4th Cir.), *petition for cert. filed*, 37 U.S.L.W. 3287 (1968) (No. 831 O.T. 1968, renumbered No. 11 O.T. 1970). *U.S. v. U.S. Coin & Currency*, 28 L.Ed. 2d 434 (1971), involved pre-*Marchetti-Grosso* forfeiture proceedings brought against one who had been previously convicted of violating the gambling tax and registration statutes by failing to submit the required forms and pay the tax. The Court held that *Marchetti* and *Grosso* should be applied retroactively to require reversal of the forfeiture since the appellant "had the Fifth Amendment right to remain silent in the face of the statute's command that [he] submit reports which could incriminate [him]. In the absence of a waiver of that right, [he] could not be properly prosecuted at all." 28 L.Ed. 2d at 440. *See also, U.S. v. Lucia*, 416 F.2d 920 (5th Cir. 1969), *aff'd en banc*. 423 F.2d 697 (1970), *cert. denied*, 39 U.S.L.W. 3480 (1971).

However, *Mackey v. U.S.*, 28 L.Ed. 2d 404 (1971), decided the same day as *U.S. Coin & Currency*, leaves unresolved the question whether *Marchetti* and *Grosso* should be applied retroactively in all contexts. *Mackey* upheld the use of submitted wagering excise tax returns in a pre-*Marchetti-Grosso* prosecution for income tax exasion. Four members of the Court[2] analogized the returns, submitted pursuant to the subsequently reviewed statutory scheme, to evidence seized in a search conducted by means which, while valid at the time of execution, are subsequently declared unconstitutional. *E.g., Williams v. U.S.*, 28 L.Ed. 2d 388 (1971) (holding *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685 (1969), non-retroactive); *see Desist v. U.S.* 394 U.S. 244, 22 L.Ed. 2d 248 (1969) (holding *Katz v. U.S.*, 389 U.S. 347, 19 L.Ed. 2d 576 (1967) non-retroactive). Of particular

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[2] One concurring opinion did not reach the question whether *Marchetti* and *Grosso* applied, and the other held they did not apply only because the case was on collateral rather than direct review.

relevance to the plurality was the fact that although Mackey's claim was grounded in a violation of the Fifth Amendment, the evidence, like that involved in the retroactive application of a Fourth Amendment exclusionary rule decision, was "concededly relevant and probative." 28 L.Ed. 2d at 410, and that the use of it would be unlikely to undermine the integrity of the fact determination process. *See also, e.g., Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed. 2d 882 (1966) (holding *Miranda v. Arizona,* 384 U.S. 436. 16 L.Ed. 2d 694 (1966) and *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed. 2d 977 (1964) non-retroactive), and *Tehan v. Shott,* 382 U.S. 406, 15 L.Ed. 2d 453 (1966) (holding *Griffin v. California,* 380 U.S. 609, 14 L.Ed. 2d 106 (1965) non-retroactive).

The Eighth Circuit has passed on the question before us in *Hanon v. U.S.,* 428 F.2d 101 (8th Cir. 1970) (en banc), *cert. denied,* 39 U.S.L.W. 3480 (1971). That court rejected the characterization of the question as one under the Fifth Amendment and treated it as a Fourth Amendment issue. Recognizing that the search was valid when made, it, like the plurality in *Mackey,* relied on the Supreme Court's reluctance to give exclusionary rule decisions retroactive sweep, since the rule is but a procedural device for implementing the Fourth Amendment, and has no significant impact on the integrity of the fact determination process. *See Desist v. U.S., supra; Linkletter v. Walker,* 381 U.S. 618, 14 L.Ed. 2d 601 (1965); *see also Williams v. U.S., supra.* The result was a refusal to apply *Marchetti* and *Grosso* retroactively in an exclusionary rule context.

We agree with the Eighth Circuit. Although the gravament of Scaglione's claim is a violation of the Fifth Amendment, the ultimate question is whether the exclusionary rule should be invoked. Therefore, reliance on the Supreme Court decisions denying retroac-

tivity to exclusionary rule cases is appropriate.[3] And, as the Supreme Court has made clear, the fact that the underlying claim is a violation of the Fifth, rather than the Fourth Amendment, does not render such reliance inapposite. *Mackey v. U.S., supra; Johnson v. New Jersey, supra; Tehan v. Shott, supra.*

Also, like the Eighth Circuit, we conclude that *Marchetti* and *Grosso* should not be given such retroactive application as would bar the introduction in a § 1952 prosecution of evidence obtained in a pre-*Marchetti-Grosso* search based on probable cause to believe a violation of the wagering tax statutes had occurred. The integrity of the fact determination process in the § 1952 prosecution was not impaired by the use of this evidence. *Hanon, supra,* at 104. *Desist,* supra, at 250, 22 L.Ed. 2d at 255; *Linkletter, supra,* at 638-39, 14 L.Ed. 2d at 613-14. And, in addition, the search was based on probable cause to believe there existed a violation of a statute which, on two prior occasions, had been upheld by the Supreme Court. *U.S. v. Kahriger,* 345 U.S. 22, 97 L.Ed. 754 (1953); *Lewis v. U.S.,* 348 U.S. 419, 99 L.Ed. 475 (1955).[4] Accordingly, the admission of the evidence seized in the April, 1965 search was not improper.

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[3] We think the case sufficiently partakes of a Fourth Amendment question that, for purposes of determining whether *Marchetti* and *Grosso* must be applied retroactively, the relevant date is the date of the search. *E.g.,* Desist v. U.S., *supra;* Williams v. U.S., *supra.*

However, while we do treat this claim as though it were under the Fourth Amendment, in view of the fact that the asserted underlying violation is of the Fifth Amendment we find it unnecessary to resolve the question whether Scaglione has standing to object to the introduction of the evidence. Even if he does, we conclude that the evidence was admissible.

[4] Washington v. U.S., *supra,* at 6, and DiPiazza v. U.S., 415 F.2d 99, 106-07 (6th Cir. 1969), *cert. denied,* 39 U.S.L.W. 3479 (1971) have also come to the conclusion we have reached, but on grounds we find unnecessary to consider. However, we note that we hold only that *Marchetti* and *Grosso* do not bar the introduction in collateral prosecutions of evidence obtained as a result of pre-*Marchetti-Grosso* searches based on probable cause to believe that the wagering tax statutes had been violated. We express no opinion on the use of evidence obtained in searches conducted after *Marchetti* and *Grosso.*

3.

There was no error in admission of various evidence which tended circumstantially to prove that the flash paper which appellant ordered was intended to be used as a device in numbers, policy, bolita and other similar games. Flash paper has other uses as well.[5] The government introduced evidence to the effect that gambling was a business with appellant — one of his means of livelihood, that he took wagers at his sundries shop and at his poolroom, that flash paper was seen at the poolroom, that he was present at the situs of a lottery operation when it was raided in an unrelated Internal Revenue case and numerous pieces of gambling paraphernalia found, that he had been convicted in municipal court for conducting a game of chance and playing games of chance, that he was found to have in his pocket a newspaper clipping describing arrest of another person named Scaglione on lottery charges.[6]

4.

While deliberating, in mid-afternoon, the jury had a communication with a deputy United States marshal, described by him this way:

> They asked if their decision had to be unanimous, and I instructed them to go by your instructions and that they would have to agree. And then I asked — they tried to ask me about something, and I said, "If you have any questions, write a note and I will take it to the Court."

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[5] There was testimony concerning use of it by magicians and sale of it to them by suppliers of magicians' equipment.

[6] A good argument can be made that the possibility of prejudice from the similarity of names outweighed the probative value of this single item, but it was only one straw in a sizeable stack. If admitting the clipping was error, it was not reversible.

Defense counsel overheard the remark, reported it to the court in late afternoon, and moved for a mistrial. The court interrogated the deputy marshal, verified what had been said, and denied the motion. At once the trial judge re-instructed the jury on the necessity for a unanimous verdict, and included therein instructions that each juror must decide the case for himself, that the verdict must represent the considered judgment of each, and that no juror was to surrender his honest conviction solely because of the opinion of fellow jurors or for the mere purpose of reaching a verdict. This was done over the objection of defendant, who insisted that the entire instruction to the jury be given again rather than the jury be reinstructed on the single matter of a unanimous verdict.

The defendant asserts there was error in overruling the motion for mistrial and focuses on the language that "[the jury] would have to agree," construed by him to possibly convey to jurors that they were required to surrender their views and accede to the views of others.

The careful reinstruction to remove the possibility of prejudice arising from the marshal's remark was a procedure available to the court in its discretion. We are not able to say that it was clearly erroneous in denying a mistrial. *Morgan v. U.S.*, 399 F.2d 93 (5th Cir. 1968).

5.

We have examined the lengthy closing arguments of counsel, covering almost 100 pages of the transcript, and conclude that there is no reversible error in the prosecution arguments. We make specific reference to only two remarks, the content of which carried the most risk of prejudice. The prosecutor said: "Pick up your newspaper as I am sure you have. Look over in New Orleans right now. They are investigating the corruption of police officials." The court admonished government counsel that he should not remind the jury of matters not in evidence and to "quit talking about what the newspapers say."

Later the prosecutor said this:

> You have an opportunity now to rip away a member of a vicious organization; an organization that lives on this type of business.
>
> Rip him away. Upset — make the rats run from the sinking ship. Because when you rip away one cog from the wheel, it will collapse.

There was no objection. The reference to rats leaving the sinking ship was intemperate, and the government acknowledges that it was, but we cannot say that it was any more than that. There was evidence that Scaglione was operating a lottery in his store, that he was in the gambling business, and that he was part of an organized operation.

Other remarks now said to be reversibly erroneous were either not improper, at all, not objected to, the objection sustained, or a curative statement made by the court.

Just prior to commencement of oral argument the court instructed counsel that he feared remarks of either side might upset the other side, which he wished to avoid, and said: "If you have any objection, either of you stand up quietly and I will stop the person who is talking and hear you. You understand that." After this fresh admonition of not only the necessity of objecting but the procedure to be followed, defense counsel asserts as error four remarks to which he entered no objection. Also, immediately after arguments and in the absence of the jury defense counsel moved for a mistrial "on the various courses of argument that the Government had," stating that as to some matters he had failed to object while argument was going on "for the purpose of continuity." Where appropriate we can, and do, recognize improper argument as plain error, reversible without the necessity of an objection. This is not such a case, from either the content of what was said

or from existence of circumstances tending to excuse counsel from his duty to object. After all, the objection is not merely to preserve a point for appellate review but also to give the court and opposing counsel an opportunity to correct errors at the time while they are still correctible.

AFFIRMED.

EXHIBIT "B"

UNITED STATES COURT OF APPEALS

Fifth Circuit
Office of the Clerk

EDWARD D. WADSWORTH
Clerk

Room 408-400 Royal St.
New Orleans La. 70130
(504) 527-6514

August 19, 1971

TO ALL PARTIES LISTED BELOW

Re: No. 29279 — U.S.A. vs. Nick Scaglione

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

EDWARD W. WADSWORTH
Clerk

By Frances Wolff
Deputy Clerk

ccs Mr. Henry Gonzalez
Mr. Bernard H. Dempsey, Jr.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-370

NICK SCAGLIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on five counts of having knowingly caused gambling paraphernalia (consisting of flash paper) to be sent in interstate commerce, in violation of 18 U.S.C. 1953. He was sentenced to concurrent prison terms of four years. The court of appeals affirmed (Pet. 9-19).

Some of the evidence used to convict petitioner was obtained under a search warrant charging vio-

lations of the wagering tax statutes (26 U.S.C. 4411, 4412, 4901 and 7203). The warrant was issued and the evidence was seized in April 1965, prior to *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62. The principal issue presented by this petition is whether such evidence was properly admitted in petitioner's trial, which was conducted in 1969, for violations of a different statute. All of the courts of appeals which have considered this question have held, like the court below, that *Marchetti* and *Grosso* do not bar the use in a collateral prosecution (such as here) of evidence seized in these circumstances. See *United States* v. *Hanon*, 428 F.2d 101 (C.A. 8), certiorari denied, 402 U.S. 952; *United States* v. *Tiktin*, 427 F.2d 1027 (C.A. 6), certiorari denied, 402 U.S. 950; *DiPiazza* v. *United States*, 415 F.2d 99 (C.A. 6), certiorari denied, 402 U.S. 949; see also *Washington* v. *United States*, 402 F.2d 3 (C.A. 4), certiorari denied, 402 U.S. 978. This Court denied review in those cases subsequent to its decision in *United States* v. *United States Coin and Currency*, 401 U.S. 715.[1]

Petitioner also contends that reversible error was committed because of a jury inquiry to a marshal and the closing argument of the prosecutor. These issues, which petitioner concedes do not by themselves warrant issuance of the writ (Pet. 7), are

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[1] The same issue is presently before this Court in *Jernek* v. *United States*, pending on a petition for a writ of certiorari, No. 71-72, this Term.

fully canvassed in the opinion below, on which we rely (see Pet. 16-18).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

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